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No. 739

IN THE

Supreme Court of the United States

October Term, 1955

BARNEY FRENCH, *Petitioner*,
v.
STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Barney French, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas entered on the 14th day of December, 1955, wherein said Court affirmed the judgment of the Criminal District Court of Harris County, Texas.

Opinions Below

The opinions below appear:

Opinion of the Court of Criminal Appeals of Texas, entitled *Barney Ellis French, Appellant v. The State of Texas,*

Appellee, reported in 284 S.W. 2d 359. It is printed in the appendix hereto, page 15.

Opinion of the Court of Criminal Appeals of Texas, entitled *Otis Wayne Harper, Appellant v. The State of Texas, Appellee,* reported in 284 S.W. 2d 362. It is printed in the appendix hereto, page 19. Said case is the one referred to in the judgment in petitioner's case, and is the reason for the final judgment being deferred in petitioner's case, because of the identical question being involved (R. 212).

Jurisdiction

Petitioner's motion for rehearing was overruled on the 5th day of October, 1955, and the judgment of the Court of Criminal Appeals was entered on the 5th day of October, 1955, and by order of the Court, December 14th, 1955, was made the effective date of the final decree. The judgment is printed in the appendix, on page 26.

The jurisdiction of this Court is invoked under Title 28, *U. S. C. A.,* Section 1257(3).

The Court of Criminal Appeals of Texas is not an intermediate court. It is the court of last resort in Texas in all matters within its jurisdiction. Its judgments are not reviewed by the Texas Supreme Court, or by any other Texas Court.

Petitioner objected to the admission in evidence of certain marijuana, which was obtained by authority of an ordinance of the City of Houston, Texas, authorizing an arrest on suspicion, said ordinance being Sec. 1649. The objections urged being that said ordinance was not authorized by Art. 214, C. C. P., was a violation of Art. 1, Sec. 9, of the *State Constitution,* the Fourth Amendment to the

United States Constitution, and Art. 727, C. C. P., and on appeal, raised the issue of the denial of due process of law, and equal protection of the laws as guaranteed under the Fourteenth Amendment to the *United States Constitution*.

Question Presented

Whether the Court of Criminal Appeals of the State of Texas erred in holding Sec. 1649 of the ordinances of the City of Houston, Texas, valid, and in so doing, violated the Fourth, and Fourteenth Amendments to the Constitution, or either of them.

Constitutional Provision, Statutes and Ordinance Involved

The pertinent constitutional provision, statutes, and ordinance are printed in the appendix hereto, on page 28.

Statement of the Case

On the 19th day of November 1954, petitioner was charged by indictment with the offense of possession of marijuana, of which charge he was found guilty by a verdict of the jury, and his punishment assessed at seven years' imprisonment in the penitentiary.

Upon appeal the case was affirmed by the Court of Criminal Appeals of Texas, to which Court this petition for writ of certiorari is directed.

On the 27th day of October, 1954, between 8:00 and 8:30 P. M. Officers Tucker and Free, both of whom were Police Officers of the City of Houston, Texas, were sitting

in a parked automobile, about 75 feet from the Trade Winds Cafe, a public place, located on Capitol Avenue, in a well-lighted area, in the City of Houston, Texas, when they saw petitioner approaching the east door of said cafe. Petitioner walked up to the door and appeared to look inside, and then left, trotting to the rear of said cafe, where he got in his automobile, and started to leave, at which time said officers arrested him, searched him, and his automobile, and took from his person, and his automobile, what was later found to be marijuana, as testified to by a chemist, on the trial of this case, and which formed the basis of the prosecution of petitioner.

At the time petitioner approached said door of said cafe, uniformed police officers were questioning, and arresting some people, in said cafe.

During the trial of said case, the State offered in evidence Sec. 1649 of the ordinances of the City of Houston, Texas, for the purpose of showing the authority of the officers in making the arrest of petitioner, and said ordinance was admitted in evidence (R. 50-51), at which time petitioner objected to it on the ground that it was invalid. The objections urged being that said ordinance was not authorized by Art. 214, C. C. P., was a violation of Art. 1, Sec. 9, of the *State Constitution,* the Fourth Amendment to the *United States Constitution,* and Art. 727, C. C. P. (R. 51), and on appeal, in his motion for rehearing, which is a part of the record in this case, he raised the issue of the denial of due process of law, and equal protection of the laws as guaranteed under the Fourteenth Amendment to the *United States Constitution,* and the Court of Criminal Appeals held said ordinance valid, under the holding in *Holt v. State,* 160 S.W. 2d 944.

The marijuana which the officers seized was seized by the authority given under said ordinance to make the arrest of petitioner, and for that reason, the trial court admitted it in evidence, over the objection of petitioner (R. 142-146).

Reasons For Granting This Writ

The opinion of the Court of Criminal Appeals makes it clear in its opinion that its decision affirming the conviction, rests primarily on the validity of Sec. 1649, of the ordinances of the City of Houston, Texas, wherein it says:

> "The city ordinance of the City of Houston, adopted pursuant to the provisions of Article 214, V.A.C.C.P., was introduced in evidence. This appears to be the same ordinance which this Court upheld in Holt v. State, 160 S.W. 2d 944, authorizing the arrest, detention and search of persons of suspicious demeanor."

In the *Harper* case, appended hereto, the Court practically withdrew its holding in the *Holt* case, and said:

> "The appellant contends that the ordinance of the City of Houston goes much further than is authorized by Article 214, V.A.C.C.P., and is therefore not authorized by the statute.
>
> "In the two Holt cases, the facts surrounding the arrest and search of the Holts are not set forth, and therefore are of little aid to us here. We note, however, that the court held the fruits of the search admissible under both the ordinance and Article 325, V.A.C.C.P."

The ordinance is not authorized by Art. 214, C.C.P., and is therefore invalid. Art. 214, C.C.P. only authorized municipal authorities to make it an ordinance, and beyond such authority, they cannot go.

Art. 214, C.C.P. does not give municipal authorities a blank check to enact an ordinance which would authorize an arrest without warrant except on the grounds set forth in Art. 214 C.C.P. This is so because criminal statutes are strictly construed, and under the rule of "expressio unius est exclusio alterius" said ordinance is invalid. "Expressio unius est exclusio alterius" means the expression of one thing is the exclusion of another. This rule surely applies in this case.

The ordinance authorizes policemen to arrest and interrogate all persons of suspicious demeanor, character or conduct, whereas Art. 214, C.C.P., only authorized the arrest of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or about to commit some offense against the laws. The ordinance does not lay down any rule as to what is meant by "suspicious demeanor, character or conduct," and leaves it wholly to the judgment of the arresting officer to place his own interpretation on said quoted words. Since there is no standard of what constitutes a person of "suspicious demeanor, character or conduct," said part of the ordinance is too vague to be valid.

The ordinance provides that if a person is arrested, and does not give a satisfactory account of himself, he shall be placed in jail. Such part of the ordinance is invalid for the following reasons:

1. It requires the person to speak, whereas it is his constitutional right to remain silent. It is well settled that the right of freedom of speech carries with it the right to remain silent.

2. It requires the person arrested to make a statement while under arrest, which is a flagrant violation of Art. 727, C.C.P.

3. It requires the officer to put such person in jail if he refuses to speak, which violates both the Constitution, and Art. 727, C.C.P It penalizes him by requiring him to be incarcerated, if he does not speak.

The ordinance does not give the officer the right to "arrest, and search," on suspicion, but only to "arrest and interrogate," and then only, if on such interrogation such person fails to give a satisfactory account of himself," he may be "taken in custody."

In appellant's case there was no "interrogation," therefore, even under the ordinance no "right of arrest" existed.

The words "arrest and interrogate," when construed with the context of the ordinance, have the meaning of "detain and interrogate," or "accost and interrogate," or "approach and interrogate," or, in other words as giving the officer the right to ascertain who such persons are, where they came from, their business, etc., and then, if such persons fail to give a "satisfactory account of themselves," to pursue the arrest further by taking them in custody. Any other construction renders the ordinance ambiguous, and meaningless.

The ordinance is also invalid, for the reason that it is left to the officer to determine whether a person's account of himself satisfies the officer, a thing that seems untenable under all the law.

In the case of *Joske v. Irvine*, 43 S.W. 278, it was said:

"We find nothing in the articles quoted to authorize the city council of the city of San Antonio to pass an ordinance empowering police officers to arrest any citizen who might by them be deemed dangerous and suspicious. That no such dangerous grant of power was intended by the legislature is shown by section 230 of the charter which prescribes the circumstances under which arrests without warrants may be made. It is as follows: 'The marshals and policemen may arrest any person committing any offense against the peace of the city or a breach of any city ordinance committed in their presence, or on complaint of any person, without a warrant.' So jealous have the American people been of the preservation of the personal liberty of the citizen that safeguards have been thrown about it in the organic law, both state and national, and in the defense of it the citizen has been clothed with resistance even to the extent of taking human life. Indeed, the vitality and face of our system of government rests upon individual liberty, and our laws are framed upon the great principle that, so long as the citizen does not infringe upon the rights of others, he shall be protected in the enjoyment of absolute personal liberty. Our state constitution grants to the citizen security in his person, and our criminal procedure has carefully specified the circumstances under which he may be arrested without warrant by state and county officers, and has clearly indicated the only circumstances under which a town or city may authorize an arrest without warrant, upon suspicion. In Article 249 of the Code of Criminal Procedure of 1895 it is provided: 'The municipal authorities of towns and cities may establish rules authorizing the arrest without warrant, of persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to com-

mit some offense against the law'. That article applies to all towns and cities, whether chartered specially or by the general statute, and there is nothing in the charter of San Antonio that indicates that the legislature intended to remove that city from the operation of that law. On the other hand, the powers and duties of the officers are, in the charter, to be limited by the constitution and statutes of the state. See section 131, above cited. The ordinance of the city of San Antonio under which Shely claimed that he acted was not offered in evidence, and the only proof offered of its existence was the testimony of Shely. Admitting that this testimony was true, and that the city of San Antonio, through its council, did confide in its policemen, the power, at discretion, to adjudge a citizen a suspicious person, and cast him into prison, it is the opinion of this court that it was an attempt to confer upon its policemen a power unprecedented in a free government, and utterly subversive of the principles upon which our whole system is founded. The grant of such power is unauthorized by constitution, statutes, and the charter and will meet with no sanction or favor in the courts of the country. It attempts to clothe the petty officers of a city with more power than is granted to any department of our government,—the power to pass summary judgment upon a human being, and incarcerate him in a dungeon, although innocent of any crime against law or society, and without the opportunity of being heard in his own defense. The facts in this case offer a pregnant example of the consequences flowing from the exercise of such power. The trial judge properly instructed the jury that the arrest was unlawful."

The case of *Price v. Durdin, et al.,* 207 S.W. 2d 228, affirms the rule that in order to justify an arrest under an ordinance enacted pursuant to Art. 214, C.C.P. the place of arrest must be a "suspicious place," and the person ar-

rested at such place, have been found thereat "under such circumstances as reasonably show" that such person has been guilty of some felony or breach of the peace, or threatens, or is about to commit some offense against the laws.

It is difficult to understand how this court can hold, even under the ordinance, that appellant was a person of suspicious demeanor, character or conduct. It is not known why appellant hurriedly left the cafe. It might have been that he had an appointment at another place, and suddenly remembered it, but the most plausible conclusion is that he, like any other normal person, did not want to be rounded up in a raid, and that is surely what would have happened if he had not left the cafe, as he did. Did this make appellant a person of suspicious demeanor, character or conduct?

The opinion cites the case of *Holt v. State*, 160 S.W. 2d 944, as authority for upholding the ordinance, but apparently, the ordinance was not under attack in that case, as it is here, otherwise the court would have discussed its validity in that case. Even if the Court had held the ordinance valid in the *Holt* case, and it now becomes apparent that it is not, it is the duty of the Court to correct its holding.

It was said by the learned Judge Davidson in the case of *Bessett v. State*, 180 S.W. 249, that:

> "The Court ought to be correct in deciding the law, rather than consistent in error."

The opinion cites the case of *McCutcheon v. State*, 252 S.W. 2d 175, as authority for upholding the arrest in this cause.

It is submitted that the *McCutcheon* case has no bearing on the instant cause, for the reason that in that case it is

shown that there was in existence an ordinance which tracked the provisions of Art. 214, *C. C. P.* In the *McCutcheon* case, it was said:

> "The State first proved that the city of Lufkin had adopted, as authorized by Article 214, C. C. P. an ordinance authorizing arrests without warrants of persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the State law or a city ordinance."

In the case of *Horrell v. State*, 61 S.W. 2d 108, it was said:

> "It is not to be understood that an arrest may be made on mere suspicion."

It will be noted that the ordinance does, in effect authorize an arrest on suspicion. It authorizes the arrest of all persons of "suspicious demeanor, character or conduct," and that is the only part of the ordinance under which appellant could have been arrested. Under the facts, it cannot be said that he was arrested under that part which authorizes an arrest if the officer "has good reason to believe that such persons intend, or are about to commit, or have committed any violation of the laws or ordinances of the city."

To hold the ordinance valid, will be to take a step toward the destruction of a constitutional guaranty, and the creation of a "police state." It will lead to innumerable abuses by city policemen, and confer upon them more power than has ever been conferred upon any other officers who are authorized to make arrests. It is "the foot in the door" marking the destruction of a constitutional guaranty,

and the decadence of a democracy, a "creeping up" on its destruction. A democracy cannot endure unless the rights of the citizen are protected by the courts. They must stand as a bulwark between the citizen and governmental encroachment, otherwise all fundamental rights will be destroyed, and the democracy will cease to exist.

In this connection it would be well to heed the warning of the learned Judge Davidson. In *Ex parte Gilmore*, 228 S.W. 199, he said:

> 'May it not be that "our own like free states forgone, is but a bright leaf torn from time's dark forest, and in the wild gust thrown to float awhile, by varying eddies borne, and sink at last forever?" '

In view of the foregoing, it is appellant's contention that he has been denied due process of law, and equal protection of the laws as guaranteed to him under the 14th Amendment to the United States Constitution.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari to the Court of Criminal Appeals of the State of Texas should be granted.

Respectfully submitted,

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Houston, Texas,
Counsel for Petitioner

Certificate

I hereby acknowledge receipt of a copy of the foregoing Petition for Writ of Certiorari this_____day of March, 1956.

Attorney General of the State of Texas,

By _____
Asst. Attorney General

APPENDIX

Opinion Below

BARNEY ELLIS FRENCH, *Appellant*,

v.

THE STATE OF TEXAS, *Appellee*

No. 27637

COURT OF CRIMINAL APPEALS OF TEXAS

June 1, 1955

Rehearing Denied Oct. 5, 1955

MORRISON, Presiding Judge

The offense is possession of marihuana; the punishment, seven years.

(1) Officer Tucker, of the Narcotic Division of the Houston Police Department, testified that he and his fellow officer Free were dressed in civilian clothes and seated in an automobile near the Trade Winds Cafe watching while certain uniformed officers were in the process of making some arrests inside the cafe on the night in question; that he observed the appellant, whom he knew and about whom he had received reports that he was handling marihuana, walking from his automobile which was parked on a parking lot at the rear of the cafe. Tucker stated that the appellant proceeded to the door of the cafe, where he could see inside, but instead of entering he abruptly turned and ran back to his automobile, started the motor, and spun his wheels in an effort to beat a hasty retreat, but that he and Free moved their automobile so as to block the appellant's exit. Tucker testified that he approached the appellant's automobile, exhibited his police credentials, instructed the

appellant to get out, searched his person, and found three cigarettes wrapped in brown paper, and that following this Officer Free searched the appellant's automobile and found two packages.

It was shown by Chemist McDonald that the cigarettes and the packages contained marihuana.

The appellant did not testify or offer any evidence in his own behalf.

There are two questions presented on appeal. We shall first discuss the admissibility of the fruits of the search.

The city ordinance of the City of Houston, adopted pursuant to provisions of Article 214, Vernon's Ann. C. C. P., was introduced in evidence. This appears to be the same ordinance which this Court upheld in Holt v. State, 144 Tex. Cr. R. 62, 160 S.W. 2d 944, authorizing the arrest, detention and search of persons of suspicious demeanor.

In McCutcheon v. State, Tex. Cr. App., 252 S.W. 2d 175, writ of certiorari denied, 345 U.S. 929, 73 S.Ct. 789, 97 L. Ed. 1359, we held the search of an automobile was authorized in a city having such an ordinance where the officers saw two men step up on the sidewalk and throw something over a hedge and, after the men denied having thrown anything, the officers found two shirts beyond the hedge and carried the men to their automobile and searched the same.

We think that the McCutcheon case is authority for our holding here that the fruits of the search were admissible.

We do not hold that the information which the officer had received about the appellant's connection with nar-

cotics alone would have authorized the search, but we do hold that his flight under the circumstances here presented, together with the information which the officer had about him, authorized the arrest of the appellant as a person of suspicious demeanor under the ordinance, and the subsequent search.

(2) The next bill of exception relates to argument of the prosecutor which the appellant contends constituted an indirect reference to the appellant's failure to testify. The very careful trial court qualified the bill by referring to the statement of facts and attached to the bill a transcript of the entire argument for the prosecution and the defense.

The bill complains of the following argument:

> "I don't want you to guess a man into the penitentiary, but when the State brings you witnesses that's not rebutted, witnesses that are not impeached, to show you that this man is guilty of the charge of the possession of marijuana, I say that you ought to put him in the penitentiary where he belongs. * * * "

From the statement of facts, we learn that, while the officers were at the scene of the arrest and while the search was in progress, or immediately thereafter, an unidentified fourth man approached the group and, not recognizing Tucker and Free as officers, addressed the appellant as follows: "Barney, are you clean—if you are not you had better dust out, the harness bulls are inside."

It thus appears that there was another person present who knew the appellant by his first name who might have been called as a witness but was not. For argument to violate Article 710, V.A.C.C.P., it must be such as cannot

reasonably be applied to the failure of the accused to produce testimony other than his own. Alford v. State of Tex. Cr. App., 255 S.W. 2d 519, and Hubbard v. State, 94 Tex. Cr. R. 480, 251 S.W. 1054.

From the statement of facts and the argument, it appears that Officer Free was not called as a witness. State's counsel stated that this was done to save time. Appellant's counsel devoted most of his argument to the failure to call Free as a witness. The appellant could have called him, and this is another reason why the argument quoted above does not reflect reversible error.

Finding no reversible error, the judgment of the trial court is affirmed.

DAVIDSON, Judge (dissenting).

The arrest of appellant was violative of his legal and constitutional rights. The ordinance of the city of Houston, the validity of which my brethren uphold, is void because it authorizes such an arrest.

For that reason, I do not agree to the affirmance of this case.

On Motion for Rehearing

MORRISON, Presiding Judge.

In our original opinion we neglected to cite two recent opinions of the Supreme Court of the United States on the question of the legality of the instant search. Since we feel that they are in point with the instant case, we now do so: Salsburg v. State of Maryland, 346 U.S. 545, 74 S. Ct. 280, 98 L. Ed. 281, and Irvine v. People of State of California, 347 U.S. 128, 74 S. Ct. 381, 98 L. Ed. 561.

Remaining convinced that we properly disposed of this case originally, appellant's motion for rehearing is overruled.

OTIS WAYNE HARPER, *Appellant*,

v.

THE STATE OF TEXAS, *Appellee*

No. 27736

COURT OF CRIMINAL APPEALS OF TEXAS

Nov. 9, 1955

MORRISON, Presiding Judge

The offense is the possession of heroin; the punishment, 10 years.

Officer Tucker testified that at approximately 5:00 P. M. on the day in question he observed two men, one of whom he recognized as Haynes, seated in a parked automobile on a street in the City of Houston some 50 feet from a filling station; that the automobile had two flat tires, and 'the right side was bent'; that Haynes was 'sitting with his head kind of slumped over the wheel,' and he could barely see the top of the head of the other man; and that it looked to him like they had been involved in an accident. Tucker circled the block, and when he returned Haynes had gone inside a filling station and the appellant was standing up on the sidewalk. He went up to the appellant, whom he knew had been to the penitentiary for narcotics and had been arrested several times on suspicion of narcotics, and he thought once for burglary; and we then quote from his testimony: 'I told him we have been having some bad reports on him; that we had heard that he had been pushing heroin

out in the Denver-Harbor Addition.' Tucker stated that he then arrested the appellant and searched his person and found the heroin which forms the basis of this prosecution.

By bill of exception No. 1 it is shown that the appellant is 5' 2" in height, weighs about 96 pounds, is a badly deformed hunchback, and when sitting is about one head lower than an average sized adult person; and, according to the officer's testimony, he got the impression that the other man with Haynes was slumped down when he first passed but that he could have been mistaken because he found that the appellant was so short.

The officer's testimony is confusing on this point, but we think a reasonable construction of the record would be that after the search the appellant was then asked where he had been, to which question the appellant failed to give a definite answer, and he was also asked where he had bought the heroin, which question no answer is shown.

Following this, Haynes came out of the filling station, and he was arrested. We think a discussion of the officer's observation of Haynes' condition at the time of his arrest would be of no probative value in this case because the appellant was already under arrest when Haynes came upon the scene.

The appellant did not testify and offered no evidence in his own behalf.

The sole question presented for review is the admissibility of the fruits of the search of the appellant's person which followed his arrest.

The State relies upon the ordinance of the City of Houston passed under the authority of Article 214, V.A.C.C.P.; Holt v. State, 144 Tex. Cr. R. 62, 160 S.W. 2d 944, and

Id., 144 Tex. Cr. R. 88, 160 S.W. 2d 957; McCutcheon v. State, 158 Tex. Cr. 419, 252 S.W. 2d 175; the recent opinion of this Court in French v. State, No. 27,637, Tex. Cr. App., 284 S.W. 2d 359, and several other cases.

The appellant contends that the ordinance of the City of Houston goes much further than is authorized by Article 214, V.A.C.C.P., and is therefore not authorized by the statute.

In the two Holt cases, the facts surrounding the arrest and search of the Holts are not set forth, and therefore are of little aid to us here. We note, however, that the court held the fruits of the search admissible under both the ordinance and Article 325, V.A.C.C.P.

In the McCutcheon case, the officers saw two men step up on the sidewalk at night and throw something over a hedge. The officers then questioned the men, and they denied that they had thrown anything; the officers then looked behind the hedge and found two shirts. We held that such conduct on the part of men unknown to the officers authorized a search of their persons and their automobile under the ordinance of that city.

In the recent French case, the facts were these. Two narcotic enforcement officers were outside a certain cafe in the City of Houston, observing, while uniformed officers were making a raid inside the cafe. They observed the appellant, who was known to them to be a handler of marijuana, walk up to the door of the cafe where he could see what was going on inside, but instead of entering abruptly turned and ran to his automobile and endeavored to leave the vicinity in great haste. In that case, we were careful to say:

> "We do not hold that the information which the officer had received about the appellant's connection with narcotics alone would have authorized the search, but we do hold that his flight under the circumstances here presented, together with the information which the officer had about him, authorized the arrest of the appellant as a person of suspicious demeanor under the ordinance, and the subsequent search."

(1) But let us now carefully examine the facts in the case before us to determine whether or not the ordinance in question, insofar as it does not conflict with or exceed the power granted the city by Article 214, authorizes the arrest and search of the appellant here.

When the officer first passed, he says he got the impression that a parked automobile had been in an accident. But when he returned, he asked the appellant no questions about a collision, nor was any proof introduced to show that the automobile had been involved in a collision. In fact, this is what he said:

> "Got out of the car and went to the defendant and started talking to him. I identified myself, and his eyes started getting big, and he seemed to get very nervous; so I told the fellow he was under arrest for suspicion, and started searching him."

We see, therefore, that, stripped of all non-essential facts, we have here an officer who comes upon an ex-convict standing on the sidewalk during the business hours of the day doing nothing to indicate that he was involved in a violation of the law, and immediately arrests him upon "suspicion" and searches his person.

These were not, as we view it, sufficient grounds to authorize the arrest under the terms of the statute and

under the provisions of the ordinance which are not in conflict with the statute. Nor do we here find sufficient facts to authorize the arrest and search under Section 15 of Article 725b, V.A.P.C., as we did in Sutton v. State, 157 Tex. Cr. R. 216, 247 S.W. 2d 894.

(2) The facts in the French case differentiate it from the case at bar. Here, we have no flight from a place under the observation of the officers. The language we used in the French case was perhaps ill-advised. We there upheld the ordinance in its entirety, without discussion, on the authority of one of the Holt cases, because the writer then felt that the facts before us there would have justified an arrest under any ordinance drawn in accordance with the terms of Article 214, V.A.C.C.P.; and no necessity, therefore, existed to pass upon or determine the validity of other provisions of the ordinance. The writer remains convinced of the correctness of our holding in the French case, but he feels that such case is not authority here and that, if the Houston ordinance may be construed as to authorize the instant arrest, to that extent it is invalid, because it exceeds the powers granted the city by Article 214, supra.

We cannot bring ourselves to believe that it was the intent of the Legislature, in the light of the constitutional mandate against unreasonable searches and seizures, to give to a city the right to authorize a search with no more cause than is shown here.

The judgment of the trial court is reversed and the cause remanded.

WOODLEY, Judge (dissenting).

In the recent case of French v. State, No. 27,637, Tex. Cr. App., 284 S.W. 2d 359, in an opinion by Presiding

Judge Morrison, the ordinance here in question was upheld. Judge Davidson dissented and expressed the view that the ordinance was void.

The writer joined in affirming the conviction in French v. State, No. 27,637, Tex. Cr. App., 284 S.W. 2d 359, entertaining the view that Art. 214, C.C.P., authorized municipal authorities to establish rules authorizing the arrest without warrant of persons 'under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws', without regard to whether the place of the arrest is or is not a 'suspicious place'.

As I view it, the question here is whether there is sufficient evidence to show that the arrest was made under circumstances reasonably showing that appellant had been guilty of or was about to commit an offense against the law.

The facts and circumstances upon which the police officer acted include the following:

He knew appellant and his companion; knew them as "police characters"; had information that appellant "was a dealer in narcotics"; told appellant before the search "We had heard that he had been pushing (selling) heroin out in the Denver-Harbor addition" (the arrest occurred in that addition); was familiar with the police records of the two men and knew appellant had "been in the penitentiary before for narcotics".

Also he had information that appellant's companion "was wanted by the Burglary and Theft division, and also from the bulletin, for robbery."

Also, the officer knew that appellant had been arrested several times for "suspicion of narcotics", and perhaps once for burglary, and that his companion had been arrested several times for carrying a pistol and had been filed on several times for procuring.

With this information, the officer saw appellant and his companion Haynes, about 5 P. M., sitting in an automobile which was parked on the street some fifty feet from a service station. Two tires on the car were blown out and the right side was bent.

The two men were seated in the car as the officer drove by, Haynes "sitting with his head kind of slumped over the wheel", and appellant seated on the right side.

The officers proceeded to the next intersection, got out of their car and came back. When they got back, appellant was standing beside the car and his companion Haynes had gone into the nearby service station.

Asked what he said to appellant before the arrest, the police officer testified "I told him we had been having some bad reports on him; that we had heard that he had been pushing (selling) heroin out in the Denver-Harbor addition."

Officer Tucker also testified:

> "Q. When you returned back to where you had seen the defendant in company with Haynes parked, what did you do, Officer Tucker? A. Got out of the car and went to the defendant and started talking to him. I identified myself, and his eyes started getting big, and he seemed to get very nervous, so I told the fellow he was under arrest for suspicion, and started searching him.
>
> "Q. Did you search him? A. Yes sir, I searched him."

Upon these facts the officer searched appellant and found him to be in possession of a narcotic. He also searched the car and arrested and searched appellant's companion Haynes, who was under the influence of a narcotic and whose arm showed signs of a recent injection of a hypodermic needle.

If we were correct in Holt v. State, 144 Tex. Cr. R. 62, 160 S.W. 2d 944, (opinion by Judge Beauchamp); in Holt v. State, 144 Tex. Cr. R. 88, 160 S.W. 2d 957, (opinion by Judge Graves) and in the French case, in upholding the validity of the ordinance authorizing arrest on probable cause to believe that accused had been guilty of some felony or breach of the peace, or threatened or was about to commit some offense against the law, though the ordinance did not require nor the facts otherwise show anything about the place of the arrest being a suspicious place, then under such holding the judgment should be affirmed.

I am at a complete loss to understand how the ordinance may be valid as applied to French and invalid as to appellant, and respectfully dissent from such holding.

Judgment of the Court of Criminal Appeals

Trial Court No. 73,347

THE STATE OF TEXAS,

TO THE CRIMINAL DISTRICT COURT OF HARRIS COUNTY—GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 5th day of October, A. D. 1955, this cause upon appeal to revise or reverse your Judgment between

BARNEY ELLIS FRENCH Appellant,

No. 27,637 vs.

The State of Texas, Appellee,

was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

Appellant's Motion for Rehearing is overruled.

By order of the Court the mandate in this case was ordered stayed until the Court had further considered this case in connection with another case which was at that time pending before the Court. Both cases were finally determined on December 14, 1955, which date was also by order of the Court made the effective date of final decree in this case.

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. W. A. MORRISON, Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 16th day of December, A. D. 1955.

/s/ Glenn Haynes

Clerk.

Deputy Clerk

Constitutional Provision

Art. 1, Sec. 9, Texas Constitution:

"The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches: and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

Statutes

Art. 214, C. C. P.:

"The municipal authorities of towns and cities may establish rules authorizing the arrest, without warrant, of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten or are about to commit some offense against the laws."

Art. 727, C. C. P.:

"The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, unless in conection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding

of secreted or stolen property, or the instrument with which he states the offense was committed. If the defendant is unable to write his name, and signs the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness."

Ordinance

Sec. 1649, of the ordinances of the City of Houston, Texas:

"Policemen shall have the right to arrest and interrogate all persons of suspicious demeanor, character or conduct, found on the squares, streets or bridges, or any public place or thoroughfare, or in, upon or about, or private buildings or premises, where they have no right or permission to be, and if such persons do not give a satisfactory account of themselves, and the police officer has good reason to believe that such persons intend, or are about to commit, or have committed any violation of the laws or ordinances of the city, is hereby made the duty of such officer to take such person into custody, or, if necessary for their safe keeping to put them in the City jail, and at the earliest time practicable to bring them with all the evidence and proofs applicable to their case before the Corporation Court for investigation and hearing."